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In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners,

v

SYLVIA BURWELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

BRIEF OF *AMICUS CURIAE* ETERNAL WORD TELEVISION NETWORK IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* ETERNAL WORD TELEVISION NETWORK

INTEREST OF *AMICUS CURIAE*[1]

The Eternal Word Television Network ("EWTN") is a nonprofit corporation located in Irondale, Alabama. Founded in 1980 by a cloistered nun, Mother M. Angelica, EWTN has since become the largest Catholic media network in the world. Via television, radio, and the internet, EWTN transmits religious programming twenty-four hours a day to more than 258 million homes in 144 countries and territories. While EWTN is not formally affiliated with the Catholic Church or any Catholic diocese, a deep devotion to proclaiming authentic Catholic teaching defines EWTN's mission.

EWTN shares the religious conviction, formed by careful and prayerful reflection on the moral teachings of the Catholic Church, that it may not provide insurance coverage for contraception, sterilization, or abortion-causing drugs. According to this belief, providing such coverage would make EWTN complicit in others' wrongdoing. Consequently, EWTN has had no choice but to resist the federal mandate—in both its original and its alternative forms—that would require EWTN to provide coverage through its health plan for such objectionable services. EWTN has done so by filing comments with the respondent Department of

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[1] No counsel for any party authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed blanket consents to the filing of *amicus curiae* briefs, as noted on the docket.

Health and Human Services ("HHS") and also by suing HHS twice in federal court in EWTN's home State of Alabama. *See Eternal Word Television Network, Inc. v. Sebelius*, 935 F.Supp.2d 1196 (N.D. Ala. 2013) ("*EWTN I*"); *Eternal Word Television Network, Inc. v. Secretary, U.S. Dep't. of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014) ("*EWTN II*") (granting injunction pending appeal).

INTRODUCTION AND SUMMARY OF ARGUMENT

Ever since it was issued in 2011, EWTN has vigorously contested the federal mandate (the "Mandate") requiring its self-insured health plan to cover contraception, sterilization, and abortion-inducing drugs. *See EWTN I*, 935 F.Supp.2d at 1225 (dismissing EWTN's original challenge to Mandate as unripe). When HHS offered an alternative mechanism for complying with the Mandate in 2013, EWTN continued to resist. In renewed litigation, EWTN protested that this so-called "accommodation" was an empty bureaucratic gesture that continued to coerce EWTN into complicity with the same objectionable practices as before. *See EWTN II*, 756 F.3d at 1347 (Pryor, J., concurring) (finding it "undeniable" that the accommodation still "compel[s] [EWTN] to participate in the mandate scheme").

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court held that HHS cannot coerce religious objectors into providing insurance coverage for services their faith considers immoral. The Court should reach the same result in these cases, and for the same reasons. The ersatz "accommodation" now offered by HHS, far from allowing objectors to avoid the Mandate, merely gives them another way of complying

with it. Essentially, the "accommodation" is the federal government's competing judgment about complicity—its assurance to objectors that *this* ought to be an acceptable degree of involvement in practices they believe immoral. But if *Hobby Lobby* teaches anything, it is that the government cannot impose its own answer to this "difficult and important question of religion and moral philosophy." *Hobby Lobby*, 134 S. Ct. at 2778. To the contrary, religious believers may answer that question for themselves alone.

EWTN has a unique perspective on the Mandate and the "accommodation" that will help the Court resolve these cases. Long before the Mandate, EWTN had walled off its health plan from covering contraception, sterilization, or abortion. Crucially, it did so—not to save money or to avoid inconvenience—but rather in a careful, informed exercise of its moral judgment. According to Catholic teaching that EWTN considers binding, covering such practices through its health plan means becoming complicit in them. The so-called "accommodation"—no less than the original Mandate—continues to coerce EWTN into exactly such complicity with wrongdoing. Giving in would not only violate EWTN's conscience, but would destroy EWTN's credibility as a witness to the Catholic faith it proclaims every day to a worldwide audience.

ARGUMENT

I. The religious exercise at issue is avoiding complicity in someone else's wrongdoing.

1. Complicity refers to "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. In *Hobby Lobby*, complicity was the key to understanding why the Mandate violated the plaintiffs' religious freedom: it coerced the plaintiffs into "providing ... coverage" for objectionable drugs and services and thus made them complicit in practices they believed immoral. *Id.* In the current round of Mandate cases, too few judges have recognized that complicity remains essential to grasping why the so-called "accommodation" *continues* to violate objectors' religious freedom.[2] Before addressing the "accommodation," *see infra* II, EWTN offers the following reflections on complicity.

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[2] *See, e.g., Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927. 941 (8th Cir. 2015) (concluding the "accommodation process ... compels [objectors] to act in a manner that they sincerely believe would make them *complicit* in a grave moral wrong"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 15 (D.C. Cir. 2015)(Kavanaugh, J., dissenting from denial of rehearing *en banc*) (observing "'the problem of *complicity* ... is the key to understanding this case'") (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring)); *University of Notre Dame v. Burwell*, 786 F.3d 606, 627 (7th Cir. 2015) (Manion, J., dissenting) ("In Notre Dame's view, the ACA alters its relationships with both [insurers] in a way that renders Notre Dame morally *complicit* in the provision of contraception.") (emphases added).

2. Long before the Mandate was issued, EWTN had to consider the moral implications of the coverage provided through its health plan. To do so, it drew on the rich tradition of Catholic moral reasoning.[3] That tradition identifies certain practices as gravely immoral, such as abortion, contraception, and sterilization. *See generally EWTN II*, 756 F.3d at 1341 (Pryor, J., concurring) (describing EWTN's religious beliefs). Whether EWTN could include such services in its plan raised the question of complicity

Like many moral questions, this one demanded careful and nuanced judgment. After all, EWTN was not contemplating whether it could engage in those practices *itself*, something plainly forbidden by its faith. Rather, EWTN was contemplating whether, by providing such coverage through its plan, it was culpably facilitating the immoral actions of others. To make that judgment, EWTN had to consider the gravity of the practices at issue, the role of insurance in facilitating them, and whether providing the coverage was nonetheless necessary to some countervailing good.

Such judgments inevitably involve questions of degree. The Catholic Church is keenly aware that Catholics must (and should) work alongside others who may not share their beliefs. Sometimes a Catholic may have to cooperate, at some level, with persons who engage in bad acts. For instance, to support his family

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[3] *See, e.g.*, Pope John Paul II, Encyclical *Evangelium Vitae* ¶ 91 (1995); Pope John Paul II, Encyclical *Veritatis Splendor* ¶¶ 28–83 (1993); Pope Paul VI, Encyclical *Humanae Vitae* ¶ 14 (1968); Catechism of the Catholic Church, ¶¶ 1749-56, 1776-94, 2270-75, 2366-79 (2nd ed. 1997).

a Catholic might take a job as a parking attendant at a hospital where abortions sometimes take place. The attendant could reasonably conclude that his work at the hospital would not involve him culpably in the abortions performed there. By contrast, a Catholic anesthesiologist could not continue to work at the same hospital—even to support her family—if she were required to participate in abortions. From the perspective of complicity, the anesthesiologist's involvement in abortion would be morally different from the parking attendant's.

With those considerations in mind, EWTN long ago reached the moral judgment that it could not provide insurance coverage for practices considered gravely immoral by the Catholic Church, such as abortion, contraception, and sterilization. To cover such practices in its health plan would have meant that EWTN itself was, in an immediate and material way, facilitating them. Given the gravity of those practices, this was not a step EWTN could innocently take. Nor would EWTN achieve any countervailing good by providing such coverage. To the contrary, because EWTN controlled the coverage in its self-insured plan, it could still provide generous benefits to employees while honoring its conscience.

3. Thus, when the Mandate was issued in 2011, it was immediately obvious to EWTN that compliance was not an option. The Mandate and its implementing regulations plainly required EWTN's "group health plan" to "provide coverage for" all FDA-approved contraceptive and sterilization methods, including methods that could cause pre-implantation abortions. 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725; *see also*

Hobby Lobby, 134 S. Ct. at 2762-63 (describing coverage requirement). HHS did offer an exemption for churches, their auxiliaries, and religious orders, *see* 45 C.F.R. § 147.131(a), but this did not help EWTN: while EWTN is dedicated to proclaiming Catholic teaching, it is not an arm of the Catholic Church, and while EWTN was founded by the head of an order of nuns, it is not a religious order. *See EWTN II*, 756 F.3d at 1341 (Pryor, J., concurring) (noting "[t]he law exempts religious employers from th[e] mandate[,] ... [b]ut the Network does not qualify as a religious employer") (citing 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). Thus, the Mandate's coverage requirement squarely applied to EWTN, raising all the red flags of complicity that EWTN had already weighed when crafting its insurance. The Mandate would convert EWTN's health plan into a vehicle for delivering precisely the services that EWTN had excluded.

4. Of course, this Court has since ruled that, under the Religious Freedom Restoration Act, those with EWTN's religious beliefs cannot be coerced into complying with the Mandate. *See Hobby Lobby*, 134 S. Ct. at 2785; 42 U.S.C. § 2000bb *et seq*. But the salient point here is that the religious belief at issue, precisely identified, is one's obligation to avoid complicity with another's wrongdoing. As the Court correctly explained, that is a "difficult and important question of religion and moral philosophy," a question that "the federal courts have no business addressing." *Id.* at 2778. For its part, EWTN answered that question—not by blind faith or intuition—but instead through careful deliberation on the rich tradition of Catholic moral theology.

II. The so-called "accommodation" does nothing to diminish complicity.

Following its loss in *Hobby Lobby*, HHS could have simply expanded the existing exemption to cover religious objectors like EWTN. Instead of that elegant solution, HHS has merely offered such objectors alternative ways of complying with the Mandate. By executing and submitting either of two forms, an objector may authorize its insurer or plan administrator to make payments for contraceptive services to the objector's own plan beneficiaries.[4] HHS refers to these alternative compliance mechanisms, euphemistically, as an "accommodation" or "opt-out." Regardless of what one calls them, the question is whether those mechanisms have resolved the problem of complicity from the viewpoint of objectors' religious beliefs.

The petitioners' briefs carefully explain why the answer is resoundingly no. *See generally Zubik* Br. at 36-37, 41-52; *ETBU* Br. at 41-56; *see also EWTN II*, 756 F.3d at 1342-43 (Pryor, J., concurring) (describing why EWTN continues to object to the "accommodation"). EWTN offers these additional reflections on why the "accommodation" utterly fails to remedy—and indeed exacerbates—the problem of complicity created by the Mandate's obligation to cover contraceptive services.

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[4] *See* 26 C.F.R. § 54.9815-2713A(b)-(c); 29 C.F.R. § 2590.715-2713A(b)-(c); 45 C.F.R. § 147.131(c); *see also generally* Brief for Petitioners at 9-14, *Zubik v. Burwell et al.*, Nos. 14-1418 *et al.* (U.S. Jan. 4, 2016) ("*Zubik* Br."); Brief for Petitioners at 13-24, *East Texas Baptist Univ. v. Burwell et al.*, Nos. 15-35 *et al.* (U.S. Jan. 4, 2016) ("*ETBU* Br.") (describing new mechanisms).

1. First, the "accommodation" does not alter by one iota the Mandate's bottom-line obligation to cover the mandated services. Before the "accommodation," EWTN's group health plan was obligated to "provide coverage for" contraceptive and sterilization methods. 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725. After the "accommodation," EWTN's group health plan has precisely the same coverage obligation. Indeed that is the whole premise of the "accommodation." It offers objectors—not a way *out* of the Mandate—but an alternative way to "*compl[y]*" with the Mandate's "requirement" to "provide contraceptive coverage." 26 C.F.R. §§ 54.9815-2713A(b)(1), (c)(1) (emphasis added).

The "accommodation" thus entirely misses the point of EWTN's objection. EWTN does not seek a different way to comply with the Mandate; it seeks to *avoid* the Mandate altogether, just as "exempted" religious organizations have been allowed to avoid it. The fact that EWTN's plan must cover contraceptive services is what, according to EWTN's beliefs, makes it complicit in wrongdoing. But the "accommodation," by its own terms, leaves the Mandate's coverage obligation pristine and intact. In other words, HHS has attempted to assuage EWTN's conscience by offering EWTN a more complicated way of violating its conscience. That is not an "accommodation," but a temptation.

2. Second, under the "accommodation" the mandated contraceptive coverage continues to be provided as *part of EWTN's group health plan*. Payments for contraceptive services are made only to EWTN's "plan participants and beneficiaries," and only "for so long as [they] are enrolled in [EWTN's] group health plan." 26 C.F.R. §§ 54.9815-2713A(b)(2)(i), (d).

The form EWTN must sign to trigger those payments, *see infra* II.3, becomes "one of the 'instruments under which the [health insurance] plan is operated.'" *EWTN II*, 756 F.3d at 1342 (Pryor, J., concurring) (quoting 78 Fed. Reg. 39,870, 39,880). Indeed, for a self-insured employer like EWTN, HHS has conceded that the contraceptive coverage is "part of the same ERISA plan as the coverage provided by the employer." Brief in Opposition at 19, *East Tex. Baptist Univ. v. Burwell*, No. 15-35 (U.S. Sept. 9, 2015); *see also Roman Catholic Archbishop of Washington v. Sebelius*, 19 F.Supp.3d 48, 80 (D.D.C. 2013) (repeating government's concession that "'[i]n the self-insured case, technically, the contraceptive coverage is part of the plan'") (quoting Mot. Hr'g Tr 18).

Thus, peeling back the regulatory layers of the "accommodation" unveils ... nothing. Not only does it leave intact the Mandate's basic obligation to cover contraceptives, but the "accommodation" continues to route that coverage through EWTN's plan. This sleight-of-hand does not remotely "accommodate" EWTN's objection to being complicit in providing contraceptive coverage. The notion that it does is, as Judge Pryor concisely put it, "[r]ubbish." *EWTN II*, 756 F.3d at 1347 (Pryor, J., concurring).

3. Third, the "accommodation" requires EWTN to undertake specific actions that compound its involvement in the objectionable services.

a. EWTN must either submit a "self-certification" form to the third-party administrator of its self-insured plan or a "notice" to HHS. 26 C.F.R. §§ 54.9815-2713A(a)(3), (b)(1), (c)(1). The effect of submitting either document is to authorize EWTN's plan

administrator to "provide or arrange payments for contraceptive services" to its plan participants and beneficiaries. *Id.* § 54.9815-2713A(b)(2). And the effects do not stop there. If EWTN submits either document, it triggers a government reimbursement to the plan administrator of 115% of the costs of the contraceptive coverage. *See id.* § 54.9815-2713A(b)(3); 45 C.F.R. 156.50(d)(3); 79 Fed. Reg. 13,744, 13,809. Thus, by submitting either document required to trigger the "accommodation," EWTN undertakes action that both authorizes and incentivizes a third party to deliver the contraceptive coverage.

b. Paradoxically, some lower courts have found that these triggering documents shift responsibility for the coverage *away* from the objector to the insurer or plan administrator, and thereby *eliminate* the objector's complicity.[5] Those courts are "clearly and gravely wrong." *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315, 1316 (10th Cir. 2015) ("*Little Sisters II*") (Hartz, J., dissenting from denial of *en banc* review). The petitioners have explained why those courts have wrongly questioned, not the objectors' legal judgment about how the "accommodation" works, but instead their theological judgment about what constitutes complicity. *See Zubik* Br. at 41-52; *ETBU*

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[5] *See, e.g., Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1186 (10th Cir. 2015) ("*Little Sisters I*") (asserting the form's "effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable"); *Notre Dame*, 786 F.3d at 613 (asserting the "effect" of signing the forms is to "throw the entire ... burden of providing contraception on the health insurer and third-party administrator" and to "lift a burden from [Notre Dame's] shoulders").

Br. at 46-51; *see also, e.g., EWTN*, 756 F.3d at 1347 (Pryor, J., concurring) (concluding, "[e]ven if the [self-certification] form alone does not 'trigger' coverage—whatever that means—it is undeniable that the United States has compelled [EWTN] to participate in the mandate scheme"). EWTN offers the following additional considerations to explain why accepting the proffered "accommodation" is forbidden by its Catholic faith.

c. In considering the moral ramifications of the "accommodation," EWTN drew on a recent situation from Germany that posed the issue of complicity for Catholic entities. *See generally EWTN II*, 756 F.3d at 1343 (Pryor, J., concurring) (discussing German analogy). Under the Pregnancy and Family Assistance Act of 1995, German law allowed certain abortions up to 12 weeks, provided the pregnant woman had received state-mandated counseling about alternatives. The German government authorized Catholic agencies, among others, to provide this counseling. The Catholic agencies took part hoping that its counselors could persuade women to choose alternatives to abortion. This gave rise to serious debate in the Church, however, over whether their well-intentioned involvement nonetheless amounted to cooperation in abortion. The problem was that, once the counseling was provided, German law required the Catholic agency to issue a certificate indicating the woman had received the counseling. If the woman rejected the agency's counsel and still wanted to have the abortion, she could present the certificate that would legally authorize the abortion.

Struggling with the moral implications of the practice, the German Bishops submitted the matter to the Vatican. After thorough consideration, the Vatican made the judgment that Catholic agencies could not issue the certificate because it legally authorized abortions to take place. A January 1998 letter from Pope John Paul II candidly admitted the nature of the dilemma. "[T]he certificate," he wrote, "attests that counseling has been given in the defence of life, but it remains a necessary condition for having an abortion performed with impunity, even though it certainly is not the decisive cause."[6] The Pope concluded that, "after careful consideration of all the arguments, I cannot avoid the conclusion that there is an ambiguity here which obscures the clear and uncompromising witness of the Church and her counseling centres." *Id.* The Pope therefore "urgently ask[ed]" the German bishops "to find a way so that a certificate of this kind will no longer be issued at Church counseling centers or those connected with the Church," while at the same time "ensur[ing] ... that the Church maintains an effective presence in the counseling of women seeking help." *Id.*[7] In a subsequent letter on the same subject, the Pope reiterated the fundamental moral principle that prohibited Catholic agencies from issuing the

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[6] Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference, at ¶7 (January, 11, 1998), *available at* https://w2.vatican.va/content/john-paul-ii/en/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany.html.

[7] *See also* Alan Cowell, "Obeying Pope, German Bishops End Role in Abortion System," N.Y. Times (Jan. 28, 1998), *available at* http://www.nytimes.com/1998/01/28/world/obeying-pope-german-bishops-end-role-in-abortion-system.html.

triggering certificate: "The unconditional commitment to every unborn life, to which the Church feels bound from the very beginning, permits no ambiguity or compromise."[8]

This analogous situation helped EWTN judge whether it could participate in the "accommodation" scheme. By signing the form, EWTN would not *intend* to facilitate immoral practices. Indeed, EWTN could simultaneously declare that it continues to object to each and every one of those practices. The overriding consideration, however, was the *effect* of EWTN's actions in executing the form, and that effect was plain: EWTN would thereby authorize and incentivize a third party to provide the same objectionable services—and not just any third party, but the party selected and retained by EWTN to administer EWTN's plan. By this action, EWTN would become "guilty of immoral cooperation with evil." *EWTN II*, 756 F.3d at 1343 (Pryor, J., concurring).

d. Filling out a form may not seem like much to ask. *See, e.g., Notre Dame*, 786 F.3d at 621-22 (Hamilton, J., concurring) (observing that, "[t]o take advantage of the accommodation," an objector "must only fill out a simple form"). But that depends on the form: ask anyone who has signed a mortgage application, a wedding license, a tax return, or a death warrant. True, some lower courts have taken the view that, because the Mandate guarantees coverage

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[8] Letter of John Paul II to the German Bishops, at ¶3 (June 3, 1999), *available at* https://w2.vatican.va/content/john-paul-ii/en/letters/1999/documents/hf_jp-ii_let_03061999_german-bishops.html.

anyway, signing the form plays a *de minimis* role in the overall scheme.[9] Against that view, the Court should ask Judge Edith Jones' straightforward question: "[W]hy does the government insist on requiring [the forms]?" *East Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing *en banc*) ("*ETBU II*"). Here is the answer:

> [W]hy *must* [EWTN] provide Form 700 to its administrator? Because without the form, the administrator has no legal authority to step into the shoes of the Network and provide contraceptive coverage to the employees and beneficiaries of the Network.

EWTN II, 756 F.3d at 1347 (Pryor, J., concurring) (citing 78 Fed. Reg. at 39,879-80) (emphasis in original).[10]

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[9] *See, e.g., Little Sisters I*, 794 F.3d at 1186 (asserting that, under the "accommodation," "the TPA's responsibility to provide coverage in [the objector's] stead stems from federal law"); *Notre Dame*, 786 F.3d at 614 (asserting "[i]t is federal law, rather than the religious organization's signing and mailing the form, that requires [insurers or administrators] to cover contraceptive services"); *East Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) ("*ETBU I*") (asserting that executing the forms "does not authorize or trigger payments for contraceptives" because insurers or administrators "are already required by law" to do so).

[10] *See also ETBU II*, 807 F.3d at 635 (Jones, J., dissenting) (explaining that "the filing of the forms ... is the *sine qua non*, the but-for cause, the indisputable link to the provision of contraceptive coverage to [religious objectors'] employees") (citing *Sharpe Holdings*, 801 F.3d 927; *Grace Sch. v. Burwell*, 801 F.3d 788, 807-08 (7th Cir. 2015) (Manion, J., dissenting)).

Admittedly, the form EWTN must sign is but one cog in an elaborate administrative machinery. But EWTN's religious freedom does not turn on how many angels can dance on the subparts of the Code of Federal Regulations. What matters ultimately is that the "accommodation"—in stark contrast to the "exemption"—requires EWTN's participation in a regulatory process whose purpose is to deliver contraceptive coverage to EWTN's plan beneficiaries. Whatever words one uses to describe the the form's regulatory function, "it is undeniable that the United States has compelled the Network to participate in the mandate scheme[.]" *Id.* (Pryor, J., concurring). EWTN's belief, which the government has never challenged, is that such participation makes it complicit in wrongdoing.

For a Catholic organization like EWTN, it is ironic that its conscience hinges on its inability to sign a piece of paper. The best known Catholic martyr for conscience, St. Thomas More, "went to the scaffold rather than sign a little paper for the King." *ETBU II*, 807 F.3d at 635 (Jones, J., dissenting). Admittedly, the penalties for not signing the Oath of Supremacy were more stringent than those for not signing Form 700. *See* Treason Act, 1351, 25 Edw. 3 Stat. 5 (Eng.) (prescribing hanging, drawing, and quartering). But the risk of signing—that is, the risk to one's conscience of doing what one knows to be wrong—is the same. EWTN therefore cannot sign.

CONCLUSION

The Court should reverse the judgments of the Third, Fifth, Tenth, and D.C. Circuits.

Respectfully submitted,

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